FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

ORIGINAL

In the Matter of

Amendment of Section 73.606(b),	)	
Table of Allotments,	)	**MM Docket No.** _____
Television Broadcast Stations.	)	**RM -** _____
(Bath, New York)	)	
	)	
Amendment of Section 73.622(b),	)	
Table of Allotments,	)	
Digital Television Broadcast Stations.	)	
(Syracuse, New York)	)	

To: Secretary, Federal Communications Commission
Attn: The Commission

OPPOSITION TO APPLICATION FOR REVIEW

William H Walker, III ("Walker") files this Opposition to the Application for Review filed by Paxson Syracuse License, Inc ("Paxson"), licensee of commercial television station WSPX-TV, Syracuse, New York (the "Station") Walker is an applicant for Channel 14 in Bath, New York Paxson seeks review of the Media Bureau's dismissal of Paxson's Petition for Rulemaking In its Petition, Paxson proposed to delete the only channel allocated to Bath, New York, Channel 14, and have it reallocated to Syracuse, New York as a seventh digital allocation to that city.

Paxson seeks the allocation of a paired DTV allotment, even though there is no available channel The channel it requests, Channel 14, is unavailable Walker filed an application for the channel, which was accepted for filing and was cut off for competing proposals on July 31, 1987 As is evident from this Opposition, and ongoing efforts to obtain a grant of his pending application, Walker fully expects that his pending application will be granted

Undeterred by the fact that Paxson has no available paired DTV channel available, it is likewise undeterred by the fact that long standing precedent does not afford Paxson's Station any

right or claim to a paired DTV allotment The *Commission's Fifth DTV Report and Order*[1] clearly provided that the Commission would issue paired DTV channels only to television stations holding an NTSC license or construction permit as of April 3, 1997 Paxson did not and does not qualify for such a paired channel Paxson now claims that the Commission's letter ruling in *Muskogee*[2] is somehow "a fundamental expansion of and shift in Commission policy that could be accomplished properly only through notice and comment rulemaking," by "permanently depriv[ing] single-channel analog broadcasters like Paxson of a paired DTV channel " *Petition* at 3. The Commission, as well as the Court of Appeals, has made it clear that unless a station was initially eligible (*i.e.*, as a permittee or licensee as of April 3, 1997) there is no entitlement or expectation of a paired DTV channel

Surprisingly, Paxson, who was an intervener in the case, fails to cite *Community Television, Inc. v. Federal Communications Commission*.[3] There the Court, in response to a specific challenge by applicants who claimed they were entitled to a second paired DTV channel concluded, "the FCC acted reasonably and adequately explained its decision not to grant the pending applicants a second channel *for the transition period* " (emphasis added) The Commission refused to grant paired digital allocations to two applicants, Pappas Telecasting of Southern California and Corridor Television, despite the fact (unlike Paxson in this proceeding) there actually were channels available The Court made it clear that *during the transition period* the rationale for not granting a paired channel was adequately addressed by the Commission.

> Our review is limited to whether the FCC acted reasonably and adequately explained its decision not to grant the pending applicants a second channel for the transition

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[1] Advanced Television Services and Their Impact Upon the Existing Television Broadcast Service. *Fifth Report and Order*. 12 FCC Rcd 12809, 12816-16a (1997) ("Fifth DTV REport and Order").

[2] Muskogee, Oklahoma, *Memorandum Opinion and Order*, FCC 03-321 (Rel March 2, 2004) ("*Muskogee*") *See also* 47 C F R § 1 115(b)(2)(iii).

[3] 216 F 3d 1133, 342 U S App D C 290 (2000)

> period It clearly did The FCC left no mystery as to its rationale Notwithstanding the pending applicants' equitable arguments arising out of their disappointment resulting from the 1996 Act, the FCC decided that the spectrum that they sought would be put to better use by providing it to new full power broadcasters as well as new and displaced low power television (LPTV) and TV translator stations. See *SMOOR*, 14 F C C R. at 1359-60 The pending applicants have not shown, in light of §336, that the date-certain approach was "patently unreasonable, having no relationship to the underlying regulatory problem " Home Box Office, Inc. v FCC, 567 F.2d 9, 60 (D C Cir 1977), see also *Cassell v. FCC*, 154 F 3d 478, 485 (D.C Cir 1998). Moreover, the FCC adequately addressed the equitable concerns of those applicants who were granted construction permits after April 3, 1997, by allowing them to convert to DTV on the channel they are granted and to apply to maximize their service area. See Service Reconsideration, 13 F C C R at 6863-66.8) As to the substance of the FCC's rationale, it is hardly arbitrary and capricious The agency reasonably balanced competing demands for spectrum and allowed the pending applicants considerable flexibility in making the transition to DTV 9)

Id. at 1142.

As contemplated by the Commission and affirmed by the Court, Channel 14 is "a spectrum that they sought would be put to better use by providing it to new full power broadcasters " Walker proposes to provide the first full power television service to Bath, New York Furthermore, as also noted by the Court, Paxson's equitable concerns are fully addressed by allowing Paxson to convert to DTV on the channel it has been granted

Walker agrees with Paxson that an inordinate 17 year delay in licensing Channel 14 is not in the public interest Walker stands ready, willing and able to construct and operate the facility on grant of his pending application, and has made ongoing efforts and inquiries with the Commission to that effect Grant of the Walker proposal is clearly in the public interest and represents the best and preferred use of the spectrum The public interest would be disserved and the statutory scheme violated by deleting the only television allocation in Bath, New York and reallocating the channel to the already well served Syracuse, New York market 47 U S C Section 307(b) mandates that Channel 14 remain allocated where it is in Bath, New York The Commission in applying 307(b)

awards a heavy preference for a first broadcast outlet to a community as opposed to an additional service to a market already well served As noted by the Court of Appeals,

> The Commission's *Sixth Report on Television Allocations*, Vol 1, Part 3, Rad Reg. (P&F) 91 601, 91 620 (1952), which carried out the mandate of 47 USC 151 and 307 (b), established five priorities for channel allocation (1) a first service to all parts of the country, (2) a local station in each community; (3) a choice of two services to all parts of the country, (4) two stations in each community; and (5) additional stations based on population, location and number of services available.

Archerner Broadcasting Company v. FCC 78 RR2nd 1369 (D C Cir 1995)[4]

Paxson's argument that Channel 14 should be reallocated is even less compelling since it is requesting that the channel be allocated as a paired digital allocation Syracuse will not be denied service offered by Paxson if the channel is not reallocated Rather, Paxson will be denied a second channel Any interest in a second channel to an already well served market pales in comparison to provision of a first service to Bath, New York

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[4] See also. *Implementation of Section 309(j) of the Communications Act - Competitive Bidding for Commercial Broadcast and Instructional Television Fixed Service License* 13 FCCRcd 15920 (1998).

> As set forth in Sections 307(b) of the Communications Act, the Commission is charged with the duty to make such distribution of broadcast licenses "among the several States and communities as to provide a fair, efficient, and equitable distribution of radio service to each of the same 47 U S C Sec 307(b) Section 307(b), however enunciates this mandate without denoting the procedure to be employed to effectuate the air, efficient and equitable distribution of radio service Over the years, the Commission has used a variety of means to implement the Section 307(b) directive Previously, when mutually exclusive applicants sought authority to construct broadcast stations to serve different communities, the Commission, in the context of the comparative hearing process, implemented the Section 307(b) mandate by first determining which community had the greatest need for additional service, before addressing the comparative qualifications of the applicants The Commission altered this approach for implementing Section 307(b) in the commercial FM and television services by establishing and incorporating in its rules a Table of Allotments for each service. The Commission fulfills the 307(b) obligation by making available for licensing only a frequency that has been assigned to a specific community in the Table of Allotments through a rulemaking proceeding. A system of priorities guides the Commission's 307(b) determinations, setting preferences for applicants proposing to establish a station in a nonserved or underserved community
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> id at ¶115

WHEREFORE, Walker respectfully requests that Paxson's Application for Review be denied

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Millie Adams, in the law offices of Gammon & Grange, P.C., hereby certify that I have sent this 9th day of April, 2004, by first-class, postage prepaid, U.S. Mail, copies of the foregoing OPPOSITION TO APPLICATION FOR REVIEW to the following:

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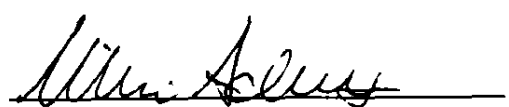

Millie Adams